

Ma (Migration) [2023] AATA 2694 (19 July 2023)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Xianjun Ma
Mrs Yangyang Wang
Mr Tianyi Ma
Ms Ruixi Ma

REPRESENTATIVE: Mr Jiang Liu

CASE NUMBER: 2118198

HOME AFFAIRS REFERENCE(S): BCC2021/463536

MEMBER: Peter Emmerton

DATE: 19 July 2023

PLACE OF DECISION: Adelaide

4.

DECISION: The Tribunal remits all the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 186 - Employer Nomination Scheme visas:

- Public Interest Criterion 4020 for the purposes of cl186.213(1) of Schedule 2 to the Regulations and subsequently cl186.213 of Schedule 2 to the Regulations

Statement made on 19 July 2023 at 11:53am

CATCHWORDS

MIGRATION – Employer Nomination (Permanent) (Class EN) Visa – Subclass 186 – a bogus document or false or misleading information – work reference may be false or misleading in relation the applicant's skills – not sufficient evidence to conclude that the

applicant has given, or caused to be given a bogus document, or information that is false or misleading – PIC 4020(2B) is met – decision under review remitted

LEGISLATION

Migration Act 1958, ss 65, 375

Migration Regulations 1994, Schedule 2, cl 186.213, Schedule 4, Public Interest Criterion ('PIC') 4020

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 25 November 2021 to refuse to grant the applicants Employer Nomination (Permanent) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
6. The applicants applied for the visas on 28 March 2021. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 186.213(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because they believed that the visa applicant had provided or caused to be provided, a bogus document or false or misleading information in relation to this visa application. Therefore PIC 4020 is not satisfied and subsequently the requirements of 186.213(1) can-not be satisfied.
7. The applicant appeared before the Tribunal, via video, on 19 July 2023 to give evidence and present arguments.
8. The applicants were represented in relation to the review.
9. The Tribunal notes there is a Non-disclosure Certificate, (NDC) issued under s.375A. The Tribunal does not consider it relevant in its deliberations in this case and has not considered the information contained within the certificate when considering this case nor disclosed the information covered by the Certificate.
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 186.213(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

12. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.
13. The Tribunal has read and carefully considered the following evidence presented to the Department prior to the hearing.
 - Covering letter (EMAIL) – POINT OF CONTACT RUIXI MA
 - Request for Health Examinations MA, XIANJUN.PDF
 - Covering letter (EMAIL) - RECIPIENT XIANJUN MA
 - Request for Health Examinations WANG, YANGYANG.PDF
 - Covering letter (EMAIL) – POINT OF CONTACT YANGYANG WANG
 - Request for Health Examinations MA, TIANYI.PDF
 - Covering letter (EMAIL) – POINT OF CONTACT TIANYI MA
 - IMMI Bridging Visa Grant Notification MA, XIANJUN.PDF
 - Covering letter (EMAIL) - RECIPIENT XIANJUN MA
 - IMMI Bridging Visa Grant Notification MA, TIANYI.PDF
 - Covering letter (EMAIL) – POINT OF CONTACT TIANYI MA
 - IMMI Bridging Visa Grant Notification MA, RUIXI.PDF
 - Covering letter (EMAIL) – POINT OF CONTACT RUIXI MA
 - MA, TIANYI, 27FEB2015-Passport
 - System Generated application.
 - MA, TIANYI, 27 FEB 2015-Birth Certificate
 - MA, RUIXI, 06 MAR 2011-Passport
 - MA, RUIXI, 06 MAR 2011-Birth Certificate
 - MA, RUIXI, 06 MAR 2011-Birth Certificate
 - MA, TIANYI, 27 FEB 2015-Birth Certificate
 - MA, XIANJUN, 01 NOV 1987-Australian Federal Police Clearance
 - WANG, YANGYANG, 01 JUN 1987-Passport
 - MA, XIANJUN, 01 NOV 1987-Passport
 - WANG, YANGYANG, 01 JUN 1987-Australian Federal Police Clearance
 - MA, XIANJUN, 01 NOV 1987-Employment Contract
 - WANG, YANGYANG, 01 JUN 1987-Marriage Certificate
 - MA, XIANJUN, 01 NOV 1987-Overseas Police Clearance - National
 - MA, TIANYI, 27 FEB 2015-Form 1229 Consent form to grant an Australian visa to a child under the age of 18 years
 - MA, RUIXI, 06 MAR 2011-Family Book Household Booklet Family Composition

- WANG, YANGYANG, 01 JUN 1987-Overseas Police Clearance - National
- WANG, YANGYANG, 01JUN 1987-Family Book Household Booklet Family Composition
- MA, XIANJUN, 01 NOV 1987-Work Reference
- MA, XIANJUN, 01 NOV 1987-Work Reference
- MA, XIANJUN, 01 NOV1987-Work Reference
- MA, XIANJUN, 01 NOV 1987-Registration Document
- MA, XIANJUN, 01 NOV 1987-International English Language Testing System (IELTS)
- MA, XIANJUN, 01 NOV 1987-Skills Assessment-ENS
- Form 1022 Notification of change in circumstances
- IMMI Bridging Visa Grant Notification - WANG, YANGYANG.PDF
- Covering letter (EMAIL) – POINT OF CONTACT YANGYANG WANG
- Work ID 6061976 - FINALISED
- IMMI s57 Natural Justice
- Covering letter (EMAIL) - RECIPIENT XIANJUN MA
- MA, XIANJUN, 01 NOV 1987-Other (specify)-letter of explanation
- IMMI Refusal Notification with Decision Record
- Covering letter (EMAIL) - RECIPIENT XIANJUN MA
- [NDC SENSITIVE] ICSE Notes - XIANJUN MA
- [NDC SENSITIVE] COI - XIANJUN MA
- [NDC SENSITIVE] Referral Outcome - XIANJUN MA
- [NDC CERTIFICATE] - XIANJUN MA

14. The Tribunal has read and carefully considered the following evidence presented to the Administrative Appeals Tribunal (AAT).

- Letter of support from Jo McMahon (People & Culture Victoria Manager) Minerva Foods, dated 12 July 2023
- Representative submission dated 12 July 2023

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

15. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
16. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
17. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
18. The applicant had provided information, in support of the subclass 457 visa application dated 5 March 2017 which was granted by the Department and the applicant held this visa in the 12 months before the current application was made. Information provided included a Certificate of Work dated 08/02/2017 (CLD2017/7695779 – Work Reference – MA Xianjun.pdf). This document refers to the applicant's employment at a business named Bayannur Zhenghong Slaughter Processing Co Ltd from June 2011 in the position of slaughterer.
19. The delegate claimed that as a result of routine checks of the applicant's work experience for the purposes of assessing the current application, the Department received information which indicates that information contained in the above-mentioned work reference may be false or misleading in relation the applicant's skills.
20. A Departmental officer contacted the company on 15 July 2021 on the telephone number 13327086985 which is claimed to be obtained from the Aiqicha website. A male person claiming to be Mr Zhao Xinhua answered the phone call. The forementioned website shows that the company's main personnel are Legal Representative, Shareholder, Executive Director, Manager Mr Zhao Xinhua and Shareholder and Supervisor Mr Wen Cuilan.
21. The delegate stated the following in their decision dated 25 November 2021. *'Mr Zhao stated that the applicant used to work in their company as a Slaughterer and his main duties was slaughtering. Mr Zhao however confirmed that he did not provide the work reference to the applicant, he confirmed again at the end of the interview that he did not provide the work reference to the applicant nor sign a work reference for the applicant.'*
22. *Mr Zhao confirmed that the duration of employment of the applicant was 1 year and several months, including the training session provided by the company for several months. This is inconsistent with the information provided in the claimed work reference that the applicant started working from June 2011 to present and the work reference was issued on 08/02/2017, which means the applicant would have worked with the business for more than 5 years.'*

23. The delegate subsequently concluded that the applicant has given a bogus document, and/or information that is false or misleading in a material particular in relation to a visa that the applicant held in the period of 12 months before the application was made. Therefore, they were not satisfied that the applicant meets the requirements of PIC 4020(1)(b).
24. PIC 4020(4) gives the delegate discretion to waive the requirements of PIC 4020(1)(b). Having considered whether there are compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the grant of the visa, the delegate, on behalf of the Minister, concluded in the negative.
25. The applicant was invited on 5 August 2021 to comment under section 57 as to the delegate's preliminary view that false evidence was provided in his 457-visa application and was thus failing to satisfy the requirements of PIC 4020(1). He was in addition asked to identify compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that would justify the granting of the visa.
26. On 21 August 2021, the applicant uploaded 2 documents to the relevant ImmiAccount:
 - Explanation Letter (with English translation) from the applicant
27. ● Statement from Mr Xinhua Zhao
28. The delegate concluded the following, having decided that little weight should be given to Mr Xinhua Zhao statement.

29. *'..... I have considered all the evidence and information currently before me, I am not satisfied that the evidence and information alleviate the concerns surrounding the legitimacy of the applicant's claimed employment experience for the subclass 457 visa application.'*
30. The Tribunal has carefully considered both the written response of the visa applicant and the response from Mr Xinhua Zhao. It has concluded that it is equally valid to assess the responses in a positive manner as was the delegate's decision to assess them in the negative.
31. The applicant has presented a cogent argument as to why the legal representative of the factory when, considering the fact that the applicant was a grass roots employee who had left the organisation in excess of 4 years prior, would be unable or indeed should not answer the questions without notice, of an individual purporting to be an Australian Embassy official on the end of a telephone. The Tribunal notes the conditions which would not have allowed verification of the bona fide nature of the enquiry. This was explored during the hearing.
32. The Tribunal notes the statement made by Mr Zhao Xinhua, the legal representative and General Manager of Inner Mongolia Bayannur Zhenghong Slaughtering Co. Ltd.

33. *'At the beginning of July, I received a strange phone call with a non-common format to inquire about the information of Ma Xianjun and several former employees of our company.'*

34. *'First of all, out of vigilance and busy business at that time, I didn't have enough time and patience to answer the phone, so I didn't verify the consultation.'*

35. *Secondly, the employee's work certificate is not an important document of the company. I barely have time and energy to ask about and scan carefully on such work certificates of ordinary employees while signing.*

36. *After verification, it is hereby certified that Ma Xianjun, male, ID number: 370181198711014817, address: Nanjianxi Village, Shuangshan Street, Zhangqiu City, Shandong Province, was engaged in full-time meat processing in our company from June 7, 2011 to March 2017.'*

37. The Tribunal notes that it is not uncommon to obfuscate rather than reveal information that might be considered personal or sensitive, particularly in relation to the Chinese authorities if information has not been agreed as suitable for release to a third party. Culturally it is considered more polite than not complying. This may well have been the case in relation to the unverifiable telephone call under discussion. The Tribunal notes that there were several employees about whom enquiries were made at the time.
38. The Tribunal notes that as it was someone purporting to be an Australian official, who could not be verified, was calling unannounced, at a time when Australia and Chinese diplomatic relations were at a very low point, it is unsurprising that cooperation is likely to be scant. Unofficial enquiries not sanctioned by the relevant Chinese government authorities could reasonably be anticipated to be dealt with very cautiously and possibly somewhat dismissively.
39. The Tribunal has reflected upon its own experiences in relation to ex-employees some substantial time after they ceased their working relationships. It has formed the view that it would be unable to provide information any more detailed or accurately than that provided by Mr Zhao Xinhua in his circumstances, if faced with similar circumstances. It is satisfied that the information provided by Mr Zhao Xinhua is relevant and as accurate as could reasonably be expected. In fact, highly detailed information could raise some potential questions of authenticity as a senior official is unlikely to know about the work history of a low-level employee working on the slaughter-house floor without reference to employment records.
40. The Tribunal has been supplied with the first 3 years of PAYG Payment Summaries for FY 2017, FY 2018 and FY 2019 pertaining to the visa applicant. The delegate was also provided with these documents but has not referred to them in a meaningful way in their decision. All 3 documents indicate an annual salary in excess of AUD \$75,000. In other words, the applicant was employed from his commencement with the Australian employer as though he was a fully qualified and experienced worker in a fast paced and highly skilled field. The Tribunal has rarely found an employer who willingly pays for a skill level they are not receiving. This is a strong indication that the visa applicant was fully qualified and experienced at a level stated by Mr Zhao Xinhua in his explanation to the Department, where he states the applicant had more than 5 years of practical experience gained on the factory floor according to company records.
41. This level of skill, which is later acknowledged by the assessment made in January 2021 as equivalent to an AQF Level III National Certificate in Meat Processing (Slaughtering), takes multiple years of experience to achieve. The assessment is both complex and comprehensive. The Tribunal again notes this information was provided to the delegate prior to the negative visa assessment and subsequent decision and was not referred to in their decision.
42. The Tribunal notes the letter of support provided by the nominating entity's People and Culture Manager dated 12 July 2023. The Tribunal accepts as fact the statements detailing the superior skill levels possessed by the visa applicant and notes they operate at the highest skill level, (level 5). This information supports the known substantial remuneration

level determination for the visa applicant. The Tribunal discussed the current level of remuneration being received by the applicant. It accepts that he receives AUD \$35-00 per hour standard time plus overtime rates on Saturdays, which he regularly works every second weekend.

43. In addition, the Tribunal accepts the following statement made by the fore mentioned Manager in their letter dated 12 July 2023, in which they state the following.

44. *‘..... ALC is a Meat Processing plant in regional Victoria that has struggled to meet its manning numbers, especially since COVID. The need to retain skilled workers like Mr Ma is crucial to ALC meeting their supplier contracts.’*

45. The Tribunal is fully cognisant of the recruitment and retention crisis facing this industry. The Tribunal having interrogated a widely known and utilised national/international recruitment website, accepts it is clearly demonstrated that in excess of 4,000 jobs in this field are currently under active recruitment nationally. It is not logical that in an industry where skilled labour has been in short supply for many years that substandard unskilled labour would be employed as this would not assist productivity. As previously stated, it takes many years to reach the top of the competency pyramid at the highest remuneration level in this role. This can not have been achieved if the visa applicant had such limited initial skill and experience prior to moving to Australia, as was assumed by the delegate.
46. The Tribunal is satisfied that there is not sufficient evidence to conclude that the applicant has given, or caused to be given a bogus document, or information that is false or misleading in a material particular. In fact, it has concluded there is a substantial body of evidence which supports the opposing view.
47. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

48. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
49. The Tribunal has no evidence before it that the applicant or any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1)
50. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

51. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
52. In Australia, the National Identity Proofing Guidelines, established by the Attorney-General's Department, defines identity as "... some combination of characteristics or attributes that allow a person to be uniquely distinguished from others within a specific context". The Department of Home Affairs (the Department) relies on a system that establishes a migrant's identity by exploring the 'three pillars of identity', regardless of whether they are applying for protection or more regular migration pathways. The three pillars are: biometrics (physical attributes); documentation; and narrative. The narrative pillar comprises both objective data

points such as nationality and ethnicity and subjective material including family composition, schooling, employment and training, or travel history.

53. The Tribunal having reviewed the visa applicants Passport photographs and details in conjunction with the verified relevant life and work history, has concluded that the identity of the visa applicants is as asserted by them. The Tribunal does not have any evidence before it to demonstrate a different conclusion is warranted.
54. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

55. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
56. There is no evidence before the Tribunal that the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused.
57. Therefore PIC 4020(2B) is met.
58. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl 186.213(1) and subsequently cl.186.213.
- 59.

DECISION

60. The Tribunal remits all the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 186 - Employer Nomination Scheme visas:
 - Public Interest Criterion 4020 for the purposes of cl 186.213(1) of Schedule 2 to the Regulations and subsequently cl 186.213 of Schedule 2 to the Regulations

Peter Emmerton
Member

61.

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...